96-979

Supreme Court, U.S.
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No. 96-976

In The

Supreme Court of the United States

October Term, 1996

GARY NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida,

Petitioner,

vs.

BARBARA PARRISH, DENNIS WETZEL and ROBERT LUCAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioner is Gary Nikolits, in his official capacity as the Property Appraiser of Palm Beach County, Florida.

The Respondents, Barbara Parrish, Dennis Wetzel and Robert Lucas are correctly identified in the caption. Frederick W. Ford, P.A. is counsel of record for all Respondents.

Each of the Respondents join in this Brief in Opposition.

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Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeals for the Eleventh Circuit. The court of appeals opinion is reported at 86 F.3d 1088 (11th Cir. 1996), petition for cert. filed. __ U.S.L.W. __ (U.S. December 19, 1996) (No. 96-979) (for the convenience of the Court, all citations to the opinion will be to the opinion attached in the Appendix to the Petition).

STATEMENT OF JURISDICTION

Section 1254(1) of Title 28 of the United States Code provides that the Supreme Court may review cases in the courts of appeal by "writ of certiorari upon the petition of any party. . . ." However, it is respectfully submitted that the Eleventh Circuit Court of Appeals decision in this case does not create inter-circuit conflict, conflict with relevant decisions of this Court, or decide an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(a), (c).

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari, on the grounds that: (1) this case does *not* involve an intermixed violation of a public employee's right of free speech *and* association, triggering the application of the *Pickering* balancing test as set forth in *O'Hare*[1] and *Umbehr*; and (2) the tests utilized by the various circuits in applying the *Branti* political affiliation criteria to patronage dismissals are not inconsistent, confusing or widely divergent.

A. Course of Proceedings and Disposition of the Case Below

Respondents do not disagree with Petitioner's recitation of the procedural background of this case as contained in the petition.

1. *O'Hare Truck Serv., Inc. v. City of Northlake*, __ U.S. __, 116 S. Ct. 2353 (1996).

B. Corrections of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the Petition to the Court's attention:

1. Petitioner's statement that "Respondents conceded . . . that this office is a policymaking position" leaves the impression that Respondents were referring to their respective positions. That is not true. Respondents agree only that the Property Appraiser himself is a policymaking position, not his subordinates.

2. Petitioner mischaracterizes Respondents' positions as "high management level deputies." (Petition at 2). While Respondents were management employees and, like everyone else in the office, from the Deputy Property Appraiser to the lowliest clerk, were designated on paper as "deputies," they had no authority or power to act on Nikolits' behalf in determining the value of property or determining the tax to be levied.

As Director of Human Resources, Parrish, like all Department Heads and employees, abided by and executed the policies established by the Property Appraiser, in his sole discretion. She never ran the day-to-day operations of the office, did not approve salary increases, could not hire or fire employees and had no authority to establish, change or alter policies. She maintained employee personnel files, but under the Florida Public Records Act, § 119.01, *et seq.*, Florida Statutes, those records are not confidential but are open to the public.

Wetzel was responsible for coordinating the purchase, installation and maintenance of the office technologies, *i.e.*, phones, computers, microfilm, equipment, software programs, communications, requests for electronic data, equipment supplies and technical personnel.

Lucas supervised a staff of 23 appraisal specialists who actually appraised the commercial property the department was responsible to assess in Palm Beach County. His work effort was to implement and follow any policy decisions that were made by administration at least two layers above his level of participation. The appraisal standards utilized were established by the International Association of Assessing Officers ("IAAO") and the Appraisal Institute. These standards were available to the professional appraisers within the Property Appraiser's Office as well as all other professional real estate appraisers. Lucas had no role in establishing those standards and could not change them.

For Petitioner to represent that Respondents "acted as advisors in formulating plans for implementing broad goals and played significant roles in the decision making process" is to mischaracterize and inflate Respondents' duties, authority and level of participation.

3. Petitioner's statements regarding his lack of trust for Parrish and Lucas (Petition at 3) are gratuitous and self-serving and are belied by the facts in the record. Parrish's only involvement in Nikolits' prior termination in 1986 was to extract a ribbon from his typewriter on the orders of the Property Appraiser, Ms. Walker, so that Walker could make a determination whether Nikolits had typed a derogatory letter about her. Parrish performed only ministerial tasks surrounding Nikolits dismissal. She did not make the termination decision.

Nikolits' alleged distrust of Lucas is likewise exaggerated. Whatever differences they had in appraisal philosophy were meaningless because the methodology and standards for appraising property were established by the IAAO and the Appraisal Institute. Whether Lucas disagreed with Nikolits could not have affected the implementation of Nikolits' policies regarding property appraisal.

4. Nikolits' alleged "restructuring" of the office (Petition at 3) did not merge Wetzel's position into another one for which he was not qualified. Nikolits merely retitledthe existing functions and managers. The computer technologies function was retitled the "Department of Geo-Processing and Information Technologies" under the supervision of the Director of the Division of Appraisal Services, a position filled by a financial contributor to Nikolits campaign, who had no computer technologies experience.

5. Finally, Respondents did not object to signing the acknowledgment (Petition at 3). On the day Nikolits took office, Respondents Parrish, Wetzel and Lucas reported to work as usual, but were called into a staff meeting and advised by Nikolits that he had issued a new Employee Handbook and that they were to read it and sign off on an acknowledgment form no later than 11:00 a.m., or they would be terminated. Plaintiffs questioned certain of the wording of the acknowledgment, noted their comments, and returned their signed acknowledgments to Petitioner Nikolits prior to 11:00 a.m. Shortly thereafter, they were called in individually and advised that their services nonetheless were being terminated. They did not abandon their positions.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT PROPERLY APPLIED *BRANTI* TO THIS FIRST AMENDMENT CLAIM BASED ON POLITICAL ASSOCIATION, AND NOT SPEECH, RATHER THAN APPLYING THE *PICKERING* BALANCING TEST REQUIRED FOR "INTERMIXED" VIOLATIONS CASES.

After virtually stipulating at the trial and appellate level that this case involved only political association patronage issues under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980),[2] Petitioner now changes horses and argues that this is an "intermixed" case between violations of Respondents' Association ***and*** Free Speech rights under the First Amendment, thereby requiring analysis under the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

This case is a pure political association case. None of the facts in the record below suggest otherwise. The facts are simple: Respondents supported Nikolits' opponents in the primary and general election. When he won, he fired Respondents and replaced them with his political and financial supporters. No instances of Respondents exercise of free speech rights implicating the balancing test in *Pickering* have been either alleged or proved in the court below.

Respondents' activities did not involve the type of free speech activity present in *Board of County Comm'rs, Wabaunsee County v. Umbehr*, __ U.S. __, 116 S. Ct. 2342 (1996) (outspoken criticism of Commissioners by independent contractor involving speaking at public meetings and letters and editorials in local

2. Nowhere in Petitioner's Brief in the Eleventh Circuit does he even cite the *Pickering* case.

newspapers), cited by Petitioner as authority for applying the *Pickering* balancing test to the circumstances of this case.

Here, Respondents did not publicly criticize Nikolits, who was running for the office of Property Appraiser as an outsider, not an incumbent. They merely campaigned for and financially supported candidates whom they believed were better qualified for the position. It was their political affiliation with Nikolits' opponents that doomed their employment — a classic political association case requiring utilization of the *Branti* "party-affiliation-as-appropriate-requirement-for-effective-performance" test, which the Eleventh Circuit properly applied. *See Barnes v. Bosley*, 745 F.2d 501, 505-506 (8th Cir. 1984) ("The *Pickering* balancing test need not be used in determining whether the first amendment protects political affiliation").

II.

THE TESTS UTILIZED BY THE CIRCUIT COURTS IN APPLYING THE *BRANTI* POLITICAL AFFILIATION CRITERIA TO PATRONAGE DISMISSALS ARE *NOT* INCONSISTENT, CONFUSING OR WIDELY DIVERGENT.

In analyzing Petitioner's attempt to fashion conflicts among the circuits in the application of *Branti*, one is reminded of Shakespeare's classic line in Romeo and Juliet, ". . . a rose by any other name would smell as sweet." (Romeo and Juliet, Act II, Scene II). Or, to alternatively describe the issue, Petitioner essentially is arguing a "distinction without a difference."

A side by side comparison of the tests used by the circuit courts clearly indicates that the various circuits are saying essentially the same thing albeit in slightly different language:

Eleventh Circuit:

> . . . party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal.

Parrish v. Nikolits, 86 F.3d 1088 (11th Cir. 1996) (App. 11).

First Circuit:

> The "test is whether the position held by the individual authorizes, either directly or indirectly, a meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation."

DeAbadia v. Izquierdo Mora, 792 F.2d 1187, 1192 (1st Cir. 1986).

Second Circuit:

The *Branti* test means

> that political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance, a reading which would exempt from protection most policymaking and confidential employees. . . .

Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988).

Third Circuit:

> . . . should a difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, then dismissals for that reason would not offend the First Amendment.

Ness v. Marshall, 660 F.2d 517, 521 (3d Cir. 1981).

Fourth Circuit:

> . . . neither may a public employee be discharged solely because of the employee's political party affiliation, unless the employer can show that affiliation with the employer's party is essential to the employee's effectiveness in carrying out the responsibilities of the position held.

Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984).

Fifth Circuit:

> . . . we recognize that "party affiliation may be an acceptable requirement for some types of governmental employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."

Vojvodich v. Lopez, 48 F.3d 879, 884 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 169 (1995), *quoting Branti*.

Sixth Circuit:

> political affiliation [can] be the sole basis of termination for public employees who held positions in which political affiliation was relevant to the performance of the job.

Williams v. City of River Rouge, 909 F.2d 151, 153 (6th Cir. 1990).

Seventh Circuit:

> The "test is whether the position held by the individual authorizes, either directly or indirectly, a meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation."

Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981).

Eighth Circuit:

> Whether political affiliation is an appropriate requirement for the position.

Barnes v. Bosley, 745 F.2d 501, 506 (8th Cir. 1984), *quoting Branti*.

Tenth Circuit:

> . . . whether the Plaintiff's job required particular political affiliation or association in order to be properly performed.

Dickeson v. Quarberg, 844 F.2d 1435, 1442 (10th Cir. 1988).

It is apparent from this comparison of the decisions of the various circuits that the "widely divergent" tests posited by Petitioner are in actuality nothing more than semantic differences in linguistic expression.

Branti left it to the courts to make the case-by-case "functional analysis" whether a particular government employee qualified for First Amendment protection against politically motivated dismissal. *Ness v. Marshall*, 660 F.2d 517, 520-21 (3rd Cir. 1981). Petitioner inappropriately attempts to characterize the circuit courts case-by-case analysis as creating divergent and confusing standards. Respondents submit that a close look at the cases cited by Petitioner demonstrates that any differences are only those necessitated by the circumstances of those individual cases. The differing application of the *Branti* test to various specific positions is evidence only of the circuit court's wrestling with the individual facts of the cases before them, and has relevance more to qualified immunity for the public official than to the delineation of the correct test to be applied. The various factors considered by the different circuits in making the functional analysis are not mutually exclusive and often overlap. Given the facts of a particular case, some may be relevant to the inquiry and some may not be.

For example, given the particular circumstances of the case, it may be necessary for the court to examine the "inherent duties" of the position involved to determine the appropriateness of political affiliation, while in other circumstances, the actual job responsibilities may be the deciding consideration. That distinction in analyzing the evidence does not create a conflict between the circuits requiring Supreme Court review.

Likewise, all of the circuits consider the policymaking or confidential status of the employee to be relevant to the inquiry, but all follow *Branti* in holding that such status is not controlling,

as it apparently was interpreted as being under *Elrod*, and which the district court below erroneously believed it was. The Eleventh Circuit decision in the instant case properly interpreted the *Branti* test, applied it to the specific facts present and did not create a conflict between its decision and other circuits by holding that "there is no evidence in the record as to whether the Appraiser's Office, whose mission is to appraise property for tax purposes based on formulae set by statute and professional standards, even implicates partisan concerns in the first instance." (App. at 11-12), reversing the district court's grant of summary judgment because the district court had applied the *Elrod* standard and not the *Branti* standard.

CONCLUSION

For the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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